



Multistate Tax Commission Memo

To: Members, Public Participation Working Group on Sales/Use Tax Nexus Guideline
From: Merle Buff and R. Michael Southcombe, Co-Chairs
Date: November 20, 1997
Subject: Reminder: Additional "Phase II" Ideas Needed by November 26th

At the October 29th meeting of the sales and use tax Public Participation Working Group, the Phase II Drafting Committee presented its preliminary list of Phase II topics for consideration by the group. For those of you who were unable to attend the meeting, the list follows at the end of this memo. The text that is struck-out on the list indicates those matters that the group determined would not be considered further at this time.

The group also decided that, in order to assure that all participants may have input in the process, the group will accept additional suggestions for the Phase II process from any participant. Keep in mind that the purpose of Phase II is to create a document reflecting: "alternative mechanisms by which the current nexus conflicts between states and sellers of goods and services may be reduced."

Your suggestions are invited. All additional Phase II topic suggestions should be sent no later than close-of business on next Wednesday, November 26th to:

Michael R. Mazerov, Director of Information
Multistate Tax Commission
444 North Capitol Street, N.W.
Washington, D.C. 20001-1538
Fax (202) 624-8819

Email: mmazerov@mtc.gov (Please include suggestions in the message itself and not as an attachment, which can be difficult to decode).

Michael will compile the new suggestions on Monday, December 1 and fax them to PPWG members on December 2. A teleconference will be held on December 3rd at 11:00 AM Eastern Time (meeting notice forthcoming) to orally review the additional suggestions and discuss further steps for Phase II. If you have any questions concerning this process, please call Michael at 202-624-8699.

SALES/USE TAX NEXUS PUBLIC PARTICIPATION WORKING GROUP

Phase II Drafting Committee's Preliminary List of Topics

(reflects items approved by the Public Participation Working Group for further study and items that were rejected by the Working Group ~~[strike-out]~~ at 10/29/97 meeting)

The list of topics suggested for consideration by the PPWG at this time consists of the following:

- Enumeration of a list of in-state temporary or occasional contacts that will not be viewed as creating nexus for the out-of-state business, *possibly including but not necessarily limited to:*
 - (1) meeting with specified business advisors and professionals;
 - (2) meeting with in-state suppliers of goods or services;
 - (3) meeting with government representatives in-state;
 - (4) holding recruiting/hiring events;
 - (5) advertising in-state through various media;
 - (6) using in-state companies to print promotional items (*e.g.*, catalogs, demo software discs) and accompanying visits to the printing location;
 - (7) using in-state companies to provide manufacturing services and accompanying visits to the manufacturing location;
 - (8) attendance, participation at, taking orders at trade shows;
 - (9) rental to/from in-state entity of customer lists;
 - (10) shipping out-of-state company's unfinished product to unrelated in-state party for processing/temporary storage of goods prior to shipment of goods out of state;
 - (11) attendance at occasional meetings (*e.g.*, Board meetings, retreats);
 - (12) presence of a Web site in-state;
 - etc.
- Address the distinction between common carriers and contract carriers, which can occur by reference to : (1) actual activities provided by each (*e.g.*, if activities of either do not exceed delivery, perhaps even in own trucks); (2) a functional equivalency test (*e.g.*, are services undifferentiated, whatever they happen to be?); or (3) a checklist of permitted activities. Phase I's Task Force 3 addressed this question in some detail.
- ~~■ Establishment of a minimum threshold of gross receipts from sales of goods or services delivered or provided to persons residing in the State, below which the out-of-state business's contacts are presumed to fall within a protected zone (whether or not the contacts are presumed to constitute protected activities).~~
- Establishment of an advance rulings procedure designed to answer taxpayer's nexus questions in situations where a State's adopted nexus approach (including its adoption of Phase I or II document components) does not provide a clear answer to the out-of-state

business concerning its sales/use tax obligations. The procedure could do a number of things, including: (1) timely grant determinations regarding nexus upon review of a particular scenario; and (2) inform an in-state vendor as to whether its provision of goods and services to an out-of-state business would create nexus or not for its out-of-state business customers (*i.e.*, the wholesaler would secure the nexus determination on behalf of a class of retailers).

- Identify indirect property interests that are not deemed to create nexus (*e.g.*, security interests, financing leases, etc.).
- ~~Application of the DMA negotiated agreement, so that all out-of-state business that qualified under the agreement can participate in the incentives toward voluntary collection of use tax~~
- A use tax collection agreement, whereby an out-of-state business could agree to provide the customer information required by a State in order for the State to impose and collect its use tax directly on in-state residents, in exchange for relief from any assertion of use tax-related liability arising from the sales in question against the out-of-state business.
- ~~Establishment of evidentiary standards (*e.g.*, for establishing “purposeful availment” or “regular and systematic solicitation” or “*de minimis*” presence), burdens of proof (including shifts in same) and presumptions where nexus disputes are pursued in a traditional forum.~~
- Establishment of a policy that affiliate nexus will not be asserted if the sole basis is common ownership/control; likewise establishment of a policy that a unitary relationship with another affiliate will not be asserted as grounds for sales/use tax nexus.
- Establishment of temporary presence standards; *i.e.*, how long can an employee/independent contractor/agent/representative be in-state without establishing nexus for the out-of-state business, when that individual’s contacts are not otherwise protected under this document?
- Addressing how long nexus lasts, once it is established.
- Statement that economic presence nexus theory will not be pursued by the state. A subset of this policy is that the presence of intangibles situated in the state will not create nexus. Alternative statement that economic presence nexus theory if established in the state by statute, regulation, or judicial law will be applied on a prospective basis only.
- Addressing the ramifications that goods once sold in tangible form may in the future be sold in intangible form. (*See* topic above.) In this regard, establishment of a policy that the sale, rental or licensing of digital products to end-users will not create nexus.

- Establishing when nexus will not result for the lessor of mobile property when the lessee moves the property into a particular State.
- Addressing when a sale occurs within a State; reference might be had to UCC principles, or other concepts (transfer of title, possession, risk of loss, location of last event, customer's location).